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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 60.

C. J. HENDRY COMPANY and FRANK SEMATOVICH,

Petitioners,

vs.

E. C. MOORE, I. ZELLERBACH and A. T. JERGENS, as the Fish and Game Commission of the State of California,

Respondents.

REPLY BRIEF OF PETITIONERS.

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REPLY BRIEF OF PETITIONERS.

I.

The statutory proceeding taken herein is not a common law remedy.

Our researches, since the oral argument, have brought to light additional authorities in England and in the reports of this Court which fully confirm our position that the statutory forfeitures of the type of that provided in *12 Car II* did not bring the proceeding *in rem* into the common law remedial scheme, but did contemplate a remedy *in rem* in the then existing courts of civil law jurisdiction, and remedies *in personam* according to the course of common law.

This duality of remedy under the Statute 12 Car II had contemporary recognition in the common law courts as is demonstrated quite definitely in the very full discussion of the case of *Roberts* vs. *Withered* in the respondents' brief, pages 11-14.

The successful argument on the motion in arrest of judgment pointed out: "Now it is no argument to say that because some persons have chose to proceed by way of information upon forfeiture on penal statutes, therefore an action of detinue will not lie". The Court agreed, holding that insofar as the rights of an informer were concerned, the bringing of an action of detinue was the common law equivalent of the civil law seizure.

It will be recalled that the Statute 12 Car II provided for the enforcement of the forfeiture by seizure, or suit for the same in any court of record by bill, *information*, plaint or other action. In the case of *Roberts* vs. *Withered* the suitor had evidently elected to proceed by the common law action of detinue wherein, of course, the process and judgment was entirely *in personam:*

That the word "information" connotes permission to invoke the jurisdiction of the Courts administering civil law remedies is clearly recognized by this Court in *The Samuel*, 1 Wheat. 9, wherein a libel in admiralty for forfeiture had been filed by the United States under the Act of March 1, 1809. This statute prohibited the importation of produce of Great Britain; provided for penalties and forfeitures on account of such importations and provided that the penalties and forfeitures incurred under the Act "may be sued for, prosecuted and recovered * * * by action of debt in the name of the United States of America, or by indictment or *information* in any court having competent jurisdiction to try the same." It was claimed that the remedial provisions of this Act contemplated common law

remedies exclusively and that there was no jurisdiction in admiralty to proceed by libel *in rem*. In sustaining the admiralty jurisdiction, Chief Justice Marshall said, page 14:

> "In arguing the first point, the counsel for the claimants endeavored to take this case out of the principle laid down in *The Vengeance*, 3 D. 297, and in other cases resting on the authority of that decision, by urging a difference of phraseology in the acts of congress. * * * Debt, indictment, and information, are said to be technical terms, designating common law remedies, and consequently, marking out the courts of common law as the tribunals in which alone prosecutions under this act can be sustained. There would be much force in this argument, if the term 'information' were exclusively applicable to a proceeding at common law. But the court is of opinion that it has no such exclusive application. A libel on a seizure, in its terms and in its essence, is an information. Consequently, where the cause is of admiralty jurisdiction, and the proceeding is by information, the suit is not withdrawn, by the nature of the remedy, from the jurisdiction to which it otherwise belongs."

Like duality of remedy was held to exist under another statute of the United States (1 Stats. at Large 289) in *United States* vs. *Grundy*, 3 Cranch 338. The statute provided for forfeiture of a vessel or its value where a false oath had been made to obtain its registration. No remedy was provided in the statute itself, but this court held the necessary inference to be that the government had, at its election, an admiralty remedy *in rem* for forfeiture of the vessel or a common law action against the perjured owner for its value.

Duality of remedy under the statute 12 Car II in the common law and in admiralty was not only permissible;

but the admiralty remedy *in rem* was expressly provided for. The statute contained a provision that all admirals and commanders at sea were authorized and required to seize and bring in as prize, forfeited vessels, and deliver them to the court of admiralty, there to be proceeded against. *The Annadale* (1877), 2 P. D. 218; 3 Asp. M. C. 489; 91.

Another forfeiture case decided by this court is the *United States* vs. *1,960 Bags of Coffee*, 8 Cranch 398, wherein it was held that the passage of title to forfeited property in cases of statutory forfeiture, depends essentially upon the language of the statute. If the vessel is declared to be forfeited upon the violation of the municipal law, title passes at once, and the ultimate decree of condemnation or judgment *in personam* relates back to the time of forfeiture. Under other statutes which provide, expressly or by implication, that title shall not vest in the sovereign until judgment or seizure, the title does not pass until the happening of that event, and prior to seizure there is nothing but an inchoate right. Justice Story filed a dissenting opinion on the question as to the time of vesting title under the statute involved and this opinion is a most exhaustive and interesting treatise on the general subject of common law and statutory forfeitures. Had the writer known of this opinion at the time of the oral argument, he would have been able to respond more competently to the invitation of the Chief Justice to compare the statutory forfeitures with the common law *deodand* (see pp. 410, *et seq.*).

It would seem to be clearly established by the foregoing cases: (1) that the statutory forfeitures are essentially different from the ancient common law forfeitures which arose upon the conviction or attainder of a personal

defendant, in that personal guilt of the owner is immaterial and the wrongful use of the thing is paramount; (2) that in their substantive aspects, the statutory forfeitures are of universal judicial cognizance; (3) that many of them provide for alternative remedies for enforcement; —*in personam* in the courts of common law jurisdiction and *in rem* in the courts of civil law jurisdiction; (4) that where the statutes are silent as to remedies and deal only with substantive rights, a suitor may select any appropriate remedy which the courts of any available jurisdiction are competent to give; (5) that the remedial jurisdiction of the common law was not enlarged by these statutes so as to include the power to administer remedies *in rem;* and that (6) where a remedy *in rem* is sought, and the property claimed to be forfeited was a thing maritime seized upon waters within the admiralty jurisdiction; that jurisdiction is exclusive.

It will also be apparent that, fundamentally, the jurisdiction as between admiralty and non-admiralty courts in England and in the United States in any proceeding under these forfeiture statutes is the same. The only difference is in the geographical concept of the admiralty. In England, jurisdiction of the admiralty did not extend within the borders of any county and was confined, by force of common law prohibitions rather than upon any sound principle, to the high seas and colonial possessions. (See *Waring* v. *Clarke*, 5 How. 441; 53) In the United States the limits of admiralty jurisdiction are the navigable waters, whether they be the high seas or territorial waters. But in both countries it is well established that jurisdiction *in rem*, based upon a seizure within the recognized geographical limits, is exclusive in the admiralty courts.

Let us pass now to the California statute here under consideration, and subject it to examination in the light

of these principles. It is clearly a statutory forfeiture of the general type of the Statute 12 Car. II and of the federal statutes above considered. Certainly it is not a common law forfeiture, for it in no way depends upon the conviction of a personal defendant. It differs from the Statute 12 Car. II only in the respect that the forfeiture does not become effective *eo instanto* upon the commission of the offense. By its express terms the court which determines the statutory proceeding must "order the same forfeited". We take it, therefore, that the title does not pass until an adjudication has been made and then presumably it relates back to the commission of the offense or at least to the date of seizure. The distinction is entirely unimportant.

Next we find that the remedial scheme of the California Statute is much more limited than the Statute 12 Car. II and most of the Federal Statutes. The remedy by seizure and petition and notice is exclusive and apparently mandatory. The commission "*must* commence proceedings in the Superior Court, etc." That seems to us definitely to exclude the idea that resort might be had, at the election of the state authorities, to any sort of common law remedy analogous to replevin, detinue or debt, or indeed any remedy whatsoever except the prescribed statutory proceeding in the Superior Court. We apprehend, however, that it would be entirely competent for the legislature of California to have provided a much more comprehensive remedial scheme, and to have empowered the commission to proceed at its election by seizure and proceeding *in rem* or by any remedy *in personam*. Indeed it would seem to follow that if the statute had merely declared that nets unlawfully used are forfeited to the state; and had remained silent as to remedial matters; jurisdiction would exist for the enforcement of the forfeiture by process *in rem* in an appropriate court or by process *in personam* in any court which could obtain juris-

diction of named defendants. However, we need not concern ourselves with a situation which might exist under another statute, or even with the question as to whether a common law remedy would be available under the statute as presently worded. No such remedy was sought in this cause, and no such remedy was afforded. The remedy sought herein and the judgment rendered were strictly *in rem* and were so regarded by the California courts throughout this litigation.

In this case we are not concerned at all with substantive rights under this statute but solely and entirely with remedies, and the jurisdiction of courts to afford them. The sections of the Judicial Code, here involved, do not deal with substantive rights. They deal only with the jurisdiction of courts. The saving clauses do not deal with substantive rights. They deal with remedies.

It is suggested in the respondents' reply that the proceedings and judgment here are not strictly *in rem* but are "in the nature of proceedings *in rem*". We cannot follow this distinction. Once it is postulated that the judgment herein does not purport to bind all the world, it necessarily follows that it does not bind anybody. A judgment may sound *in rem* or *in personam* or both, but we cannot imagine another alternative.

It was held by the Supreme Court of California that the cause of action here, although maritime, was not excluded by the *Moses Taylor* rule from the jurisdiction of state courts; that *The Moses Taylor* and cases following it were concerned with types of *in rem* proceedings that were foreign to the common law (R. 45). We take it, as do the respondents, that the court thereby meant that the cases where the *Moses Taylor* rule is adhered to were, for the most part, suits to foreclose maritime liens. Respondents' counsel claim that right of forfeiture is not a maritime lien,

and that the *Moses Taylor* rule must be confined to cases involving foreclosure of strict maritime liens for liquidated or liquidatable damages in causes of maritime contract and maritime tort. This distinction is entirely unsound.

The right of a municipal authority to seize and have forfeited a thing maritime for violations of municipal law rests upon precisely the same principles as the right of the holder of a maritime lien. It is a right in the thing, resting upon constructive hypothecation of the thing. In an ordinary case of civil tort, this constructive right arises because the vessel or thing by its wrongful act has caused injury. The injured party, therefore, has a right in the thing which the courts will adjudicate and enforce. Exactly the same situation exists when the thing is used in violation of a municipal regulation.

Prize causes and causes of seizure for municipal forfeitures fall within the admiralty jurisdiction over maritime torts.

The Belfast, 7 Wall 624; 37.

> "The right of the Crown to have a ship forfeited arises at the instant when the wrongful act is done, and, *like a maritime lien*, clings to the ship so that it overrides the right of a subsequent *bona fide* purchaser without notice of the fraud."

Roscoe's Admiralty Practice, 4th Ed. p. 261.

We submit, therefore, that if the right of forfeiture is not a maritime lien by very definition, it is so closely analogous to a maritime lien and rests so essentially upon the same legal principles, that no valid distinction can exist.

But, let us assume that there is a valid distinction between maritime liens and rights of forfeiture. The exclusive jurisdiction vested in the admiralty courts by the

Judicial Code is not limited to causes upon maritime liens, and the prohibition of the *Moses Taylor* rule is not limited to proceedings for the enforcement of liens. The Judicial Code says that the jurisdiction of the district courts of the United States in *all cases* of admiralty cognizance shall be exclusive of the courts of the several states. The cases announcing the *Moses Taylor* rule say that in *all* proceedings *in rem* the causes are excluded from state court jurisdiction. There is neither principle nor authority for limiting the rule to causes of strict maritime liens.

This court has frequently stated the nature of the admiralty proceeding *in rem*, and has not limited the definition to the enforcement of maritime liens.

> "Process *in rem* is founded on a right in a thing and the object of the process is to *obtain the thing itself*, or satisfaction out of it for some claim resting upon a real or quasi proprietary right in it."
>
> *The Maggie Hammond*, 9 Wall 435, 436.

> "Actions *in rem* are prosecuted to enforce a right to things arrested to perfect a maritime *privilege or a lien* attached to a vessel or cargo or both".
>
> *The Sabine*, 11 Otto 384; 388.

If the right to seizure for forfeiture is not strictly a maritime lien, it is most unmistakably a maritime right or privilege.

Jurisdiction *in rem* in the admiralty includes the enforcement of many rights which are not maritime liens within respondents' limited concept, and which involve relations to vessels and things maritime other than that of mere debtor and creditor. The rights of owners of things maritime are within admiralty jurisdiction *in rem*

and form the subject matter of petititory and possessory causes. The rights of part owners may be litigated *in rem* in causes of licitation and partition. Penalties and forfeitures for violation of municipal laws are litigated in proceedings *in rem* in causes of seizure. None of these are causes involving maritime liens under counsel's concept. Yet, the *in rem* jurisdiction of admiralty in those matters has been long established and universally accepted. Any limitation of the *Moses Taylor* rule, such as that advocated by the respondents, would withdraw from the exclusive jurisdiction of the admiralty, all these causes and we are sure that none of the Justices of this court who have joined in the decisions under the *Moses Taylor* rule had any such limitation in mind. In our opening brief, pages 17 to 25, we quoted the pronouncements of this court as to the extent of the prohibition against state court jurisdiction in admiralty causes, and it will be noted that on every occasion the opinion has said that *any* proceeding *in rem* is within the rule. We have failed to find any exception or qualification whatsoever.

II.

The cause of action herein is maritime and within admiralty jurisdiction.

Although the California Supreme Court sustained the jurisdiction herein by characterizing this statutory proceeding *in rem* as a "traditional common law remedy", the presentation for the respondents in this court suggests that counsel have little, if any, confidence in that holding. Evidently they place their main reliance for sustaining jurisdiction upon the claim that the cause of action herein was

non maritime, and no conflict with the admiralty jurisdiction is possible.

Counsel's basic authority, they say, is *Smith* vs. *Maryland*, 18 How 71, which was decided by this court twelve years before the first pronouncement of the *Moses Taylor* rule, and in which it is fully apparent that neither the court nor counsel were conscious of the problem presented in this case. We believe that almost enough has been said in the earlier briefs and at the argument to dispose of *Smith* vs. *Maryland* as an authority herein, but what little we have to add will be more forceful at the conclusion of this discussion, wherein we shall explore the essential character of the cause of action.

In the state courts we claimed that this is a cause of admiralty jurisdiction because it is a proceeding to vindicate a seizure of a thing maritime, made on the navigable waters. The Supreme Court of California sustained this claim in both of its opinions, and stated the basis and authority therefor (R. 37-8; 41-2). In this respect the state court was entirely sound.

Counsel insist that the character of the property and the situs of the seizure are not the true tests of admiralty jurisdiction, and that it depends upon whether the character of the substantive law in respect of which the forfeiture is claimed, is maritime or non maritime. They assert that the power to regulate fishing in territorial waters is exclusively with the states, and is non maritime; so jurisdiction of a cause of seizure for violation of such regulation must be non maritime.

The fallacy of these propositions may be demonstrated without the need to follow counsel in their examination into the basic concepts of the maritime law and the admiralty jurisdiction, or without pointing out how badly these quite

different concepts have been confounded. This court has been required to examine these matters many times and will not welcome the added labor of doing it in this cause.

Our very simple question here is: Have we a cause of action cognizable in admiralty? If so, it is a maritime cause of action, and it does not matter an iota whether the law upon which the state claims its substantive right is maritime or non maritime; state created or created by congress; statutory law or unwritten law. The validity of the authority for, and the rights and wrongs of the seizure, are for the determination of a court of competent jurisdiction, and our only problem is to determine where that jurisdiction lay.

The test of jurisdiction in causes of seizure for municipal forfeitures has been settled since the earliest days of this court. The test, as in any case which sounds essentially in tort, is the test of *situs*. It does not matter what was the character of the offense, or where it was committed. The place of seizure determines the jurisdiction. This was first held in *United States* v. *La Vengeance*, 3 Dall, 297, and was followed by many cases wherein the test was affirmed and re-affirmed. Many of the significant cases are cited in our first brief, pp. 14-16. We have never heard of any other test.

This jurisdiction was not created by the constitution or by any act of Congress. It was an historical admiralty subject matter from the earliest times in England, and Godolphin, Judge of the Admiralty under the Protectorate and Kings Advocate after the Restoration, included it as one of the "affairs" within the cognizance of the admiral.

"In like manner, all matters that concern owners and proprietors of ships as such;—also all causes of seizures and captures made at sea, whether *jure Belli Publici*, or

jure Belli Privati, by way of Reprisals, or *jure nullo* by way of Piracy;

> Godolphin, View of the Admiral Jurisdiction (1685) quoted in 4 Benedict, Admiralty, 6th Ed. pp. 392-3.

The Commissions of the Vice Admirals in the American colonies directed the governors as vice admirals to take cognizance of "* * * all manner of fines, mulcts, issues, forfeitures, amerciaments, ransoms and recognizances whatsoever, forfeited or to be forfeited, and pecuniary punish ments * * * in any court of our admiralty there held or to be held, presented or to be presented, assessed, brought, forfeited or adjudged;"

> Commission of Edward, Lord Cornbury as Vice Admiral, 4 Benedict, Admiralty, 6th Ed. pp. 409; 413.

During the pre-constitution period of the independence of the American states, the maritime states set up their own courts of admiralty, with some varying limitations on the wide jurisdiction of the colonial vice admirals, but we have not learned that any state ever excluded therefrom the ancient jurisdiction over seizures for forfeiture. Maryland, in 1776, set up a special court of admiralty to take cognizance of all libels on account of captures and seizures (4 *Benedict, Admiralty*, 6th Ed. p. 440).

When, by the constitutional grant, jurisdiction of all admiralty and maritime causes passed to the United States, it is obvious that jurisdiction of seizures at sea passed with it, and by the 9th section of the judiciary act of 1789, was vested exclusively in the district courts of the United States.

But, the respondents insist, this forfeiture arose under a *state law*, and the decisions of this court, dealing with

forfeitures under United States laws, are without bearing. Only seizures under *national* law, say counsel, come within the admiralty jurisdiction (Brief 51-4).

It obviously is not the character of the law, state or national, maritime or non-maritime, that makes a case of admiralty or non-admiralty cognizance, but the character of the *cause of action* which is to be asserted. Causes under the *United States laws* are not of admiralty cognizance *per se*, but only where they are civil causes of *admiralty and maritime jurisdiction*. Precisely the same test of admiralty jurisdiction must be made in cases arising under federal laws as must be made in cases arising under the laws of a state. What was the *situs* of the seizure? If it was on the navigable waters it is an admiralty cause. If on land, or non-navigable water, it is a non-admiralty cause.

It is true, of course, that in causes arising under the laws of the United States, original jurisdiction is exclusive in the *United States District Courts* in non-admiralty as well as in admiralty causes, but the former jurisdiction exists by virtue of other provisions of the Judicial Code than the grant of admiralty jurisdiction. *Sec. 24, subd. 3*, in addition to the admiralty grant, also confers jurisdiction "of all seizures on land or water *not* within the admiralty and maritime jurisdiction", and *subd. 9* confers jurisdiction "of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States". By *Sec. 256*, jurisdiction of admiralty causes *(subd. 3)*; and of causes of seizures under the laws of the United States on land or on water not within the admiralty jurisdiction *(subd. 4)* is *exclusive* of the courts of the several states.

It is significant to note that the jurisdiction of non-maritime seizures mentioned in Sec. 24, subd. 3, *are not exclusive*

in the district courts, unless they are made under the laws of the United States. This would seem clearly to leave open to state jurisdiction, non-maritime seizures under their own laws, by proceeding *in rem* or otherwise.

If, because of the grant of admiralty jurisdiction, the United States is compelled to litigate the validity of its seizures made upon navigable waters on the admiralty side of the district courts, it is hard to see upon what principle a state may escape it. It was settled in *The Glide*, 167 U. S. 606, that a state might validly create by law, a lien or right in a thing maritime, but the *enforcement* of anything in the nature of a maritime lien was a cause of admiralty cognizance, and if the preceeding was *in rem*, it was within the exclusive jurisdiction of admiralty. We cannot differentiate in any essential principle, the case of a state created right of seizure which is to be exercised on the navigable waters, and a state created maritime lien.

Any color of support which the respondents claim from the terms of the original *9th section* of the *Judiciary Act of 1789* (quoted in the footnote of Respondents' Brief, p. 52) will vanish upon a reading of the final paragraphs of the opinion in *The Eagle*, 8 Wall 15; 25-6.

Counsel insist that the regulation of fishing is a non-maritime matter, and is exclusive in the states. This seems heretical to us in the light of the historical jurisdiction of admiralty, but we must decline to enter into controversy over it. It doesn't matter in the least, for the states, at this time, *have* exclusive power to regulate fishing in their territorial waters. It may be because of retained police power, or it may be by grace of congressional inaction. It doesn't follow at all that because Congress has not assumed to regulate fishing, the subject is non-maritime. Granting that it is at present, a local matter; many maritime subjects

are local matters, and Congress has left many of them for state regulation. Pilotage, quarantine regulations, most harbor regulations, local maritime employment are, or until quite recently, were, left entirely to state regulation. The state laws on such matters are just as much a part of the maritime law as the acts of Congress. They are perfectly valid and enforceable in admiralty, unless they contravene a paramount act of Congress or work disharmony in the maritime law in its international or interstate relations.

Southern Pacific Co. v. Jensen, 244 U. S. 205;
1 Benedict, Admiralty, 6th Ed. secs. 34 and 35; pp. 75-83.

But, assuming for the sake of argument, that the regulation of fishing is a non maritime subject, it does not change a cause of maritime seizure into a non maritime cause. The subjects of municipal regulation under federal and state powers are manifold. Very few of them, however, can be said to deal exclusively with maritime subjects. We can say that the laws against piracy, and the laws covering the registration, use and operation of ships are strictly maritime, but that is about all.

On the other hand there are a vast number of subjects of municipal regulation which are strictly non maritime as to subject matter, although their violation may involve the use of ships and parts of ships. Here we can make an almost limitless enumeration, but to confine ourselves to a few obvious ones, let us take the laws against slaving, non intercourse laws, customs duties, protection of game and fish (the latter is non maritime say counsel), protection of public property on land, confiscation laws as to enemy or rebel property, and the ever interesting subject of national prohibition.

Seizures and forfeitures of property used in the violation of all these municipal laws have been provided for by statute, but we have never found a case where the jurisdiction was laid upon the character of the law said to be violated. Invariably it is laid according to the *situs* of the seizure. Here are a few of the cases.

United States v. *La Vengeance*, 3 Dall. 297. Exportation of arms contrary to 1 Stats. at Large 369. Seizure of a ship on the water. Held a civil cause *in rem* with jurisdiction in the admiralty.

The Sally, 2 Cranch 406. Slaving contrary to 1 Stats. at Large 347. Seizure of ship on the water. Jurisdiction in the admiralty affirmed.

The Betsy and Charlotte, 4 Cranch 443. Violation of Non-Intercourse Act, 2 Stats. at Large 351. Seizure on water. Jurisdiction in admiralty affirmed, the court saying: "It is the place of seizure, and not the place of committing the offense which decides the jurisdiction".

The Samuel, 1 Wheat 9 Statute (Act of Mar. 1, 1809) prohibited importation of goods from Great Britain. Admiralty jurisdiction sustained upon a water seizure.

The Sarah, 8 Wheat 391. Libel against a cargo of wine for false entry of importations. The libel was filed on the admiralty side of the court, alleging a seizure on the waters. On the trial it appeared that the seizure was made on land; whereupon the trial court directed a jury to be empanelled, and a judgment of condemnation was rendered on the verdict. On appeal to this court, the judgment was reversed and the cause remanded, the court saying that although the admiralty and non admiralty jurisdiction were vested in the same court, they were as distinct from each other as if vested in different tribunals.

"The court for the Louisiana district was acting as a court of admiralty; and when it was shown that the seizure was made on land, its jurisdiction ceased" (p. 394).

After the libel had been amended "so as to become technically an exchequer information for seizure", the case came up again on writ of error in *United States* v. *422 Casks of Wine*, 1 Pet. 547.

The last two cases involved the customs laws, which are not maritime in subject matter. Custom duties cannot be collected by a suit in admiralty, unless the statute gives a lien or provides for forfeiture, and a seizure is duly made on navigable waters. See *United States* v. *350 Chests of Tea*, 12 Wheat 486; 498, where the court said:

> "Now, it is not pretended that this is a civil cause of admiralty and maritime jurisdiction; and it has already been shown, that there is no law of the United States, of impost or otherwise, to warrant the seizure of the teas in question, or to subject them to forfeiture. But even if there were such a law, the only proceeding which could have been instituted under it, must have been to forfeit the articles seized, and not to subject them to the payment of duties. If the case be not one of forfeiture, we can perceive no ground upon which the District Court could entertain a suit, by way of libel, to enforce the payment of duties. No jurisdiction is conferred upon that court in such a case, either by the above section of the judiciary act, or by any other act of Congress. There is no doubt, but that a suit at common law might be instituted in that court, as well as in the Circuit Court, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or damages for the illegal taking or detaining of the same. But the remedy which has been selected, is not one which can obtain the sanction of this court."

Under the Civil War Confiscation Statute, (Act of Aug. 6, 1861) which was certainly not maritime in subject matter, the question of jurisdiction as between admiralty and non admiralty often rose. The general subject was considered by this court in *Union Insurance Co.* v. *United States,* 6 Wall 759; 764. In that case and in *Armstrongs Foundry* v. *United States,* 6 Wall 766, the seizures were of buildings on land, and it was held that the jurisdiction was not in admiralty, although the forms of admiralty might be followed. In *The Confiscation Cases* 7 Wall 454, vessels were seized on the water, and it was held that the jurisdiction was in admiralty.

These last mentioned cases arose under the same statute. The jurisdictional question in them, as well as in the earlier cases herein cited, was not technical or artistic; it involved vital rights, for if the causes were not in admiralty, the owners were entitled to trial by jury; whereas if they were admiralty causes, there was no such right.

By this line of the decisions of this court, (and we have not cited all of them), the principle that jurisdiction depended upon the *situs* of the seizure became so firmly fixed, that there is seldom any discussion of it. It is taken for granted in scores of cases involving all sorts of forfeitures and penalties. It will be interesting, however, to look at a few cases under the federal fish and game conservation laws in the territories wherein the federal government exercises the same sovereign functions as do the state governments in their territory.

In *The Tokai Maru,* C. C. A. 9, 190 Fed. 450, an alien vessel was seized for taking fish in Alaskan waters, other than by rod, etc., contrary to *34 Stats. 263;* almost an identical offense with that for which the net in this case was seized. The jurisdiction was in admiralty.

In *The Kodiak*, D. Alaska, 53 Fed. 126, a vessel was seized for alleged taking of sea otter in the territory of Alaska and in the waters thereof (R. S. 1956). Jurisdiction in admiralty was entertained and confirmed. The cause was heard on the merits and the libel dismissed for lack of proof. The case is particularly interesting in that it appears probable that the otter were actually taken on land. Jurisdiction in admiralty rested entirely upon the seizure on the sea.

In *La Ninfa*, C. C. A. 9, 75 Fed. 513, admiralty jurisdiction of a water seizure was accepted for alleged violation of the acts against sealing in Alaska and its territorial waters (R. S. 1956). The decree of forfeiture was reversed on the merits.

The following cases arose under the National Prohibition Act:

Kennedy v. *United States*, C. C. A. 9, 44 Fed. 2d 57, involved a seizure of alcohol imported from the Philippine Islands, made on land after arrival. It was held not to be of admiralty jurisdiction on account of the land seizure (42 Stats. 858, and 27 U. S. C. A. 40).

The Harber Trader, C. C. A. 2, 42 Fed. 859, was a seizure of a vessel and cargo of liquor under the National Prohibition Act (27 U. S. C. A. 40). It was held that the libel for forfeiture would lie, although it was held that there also existed, the right of summary sale of the property on conviction of the defendants. This case is interesting, as the forfeiture of property under the National Prohibition Act is essentially a common law forfeiture, depending upon conviction of a defendant. The remedy in admiralty by proceeding *in rem* is implied. It is another illustration of duality of remedy under a forfeiture statute, for, of course, a summary forfeiture in a criminal case is a conventional common law remedy.

A most interesting case is *The Barbara Cates*, E. D. Pa., 17 Fed. Supp. 241. This was a libel in admiralty to enforce damages as a penalty against a vessel for running into a government dike (33 U. S. C. A. 408-12). The *offense*—damaging the land structure, was non maritime tort. After careful reflection and study, the court held that the cause of action was not tort but *seizure to enforce a penalty*, and upheld the jurisdiction in admiralty because the seizure had been upon navigable waters.

From these cases it appears without doubt that the essential cause of action in these cases is not based on the nature, character or place of the alleged offense, but is based on the seizure. The logic of the situation is unescapable, for it is by the seizure that the government takes the first step in the assertion of its alleged right against the *res*. The seizure is rightful or wrongful as the event of the decree shall determine, and on the right or wrong of it, the ultimate property in the *res* will rest. It is therefore proper that the *situs* of that crucial act should determine the jurisdiction of the action.

We must not overlook the case of *The Bessie Mac*, W. D. Wash, 21 Fed. Supp. 220, which is square authority for the proposition that exclusive jurisdiction of seizures under state statutes for violation of state fishing laws is in the admiralty. This decision was published while the case at bar was in the appellate courts of California, and was cited with approval by the Supreme Court in its first opinion (R. 39). Counsel for respondents has vainly tried to distinguish it (Brief, 34-6).

During the argument, it was suggested that a jurisdictional distinction might exist between the case of a seizure for forfeiture of a vessel, and one for forfeiture of a net. We think not. There can be no doubt that a vessel is the essence of a thing maritime, and her essential equipment

is a part of her. The point might require consideration if the net had not belonged to a vessel, and was used as a beach net from the shore (see *Lawton* v. *Steele*, 152 U. S. 133). But this net was the *Reliance's* sole means of performing her function, and was as much part and parcel of her as her engine. This point was considered by the state court in both opinions (R. 37-8; 41-2), and correctly determined. The special equipment of a fishing boat,—her nets, lines, fishing stores and seime boat; the special machinery of a salvage ship, and the diving equipment of a pearler or sponger have ever been regarded as part of the vessel's "appurtenances" (see cases cited in our opening Brief, p. 14). They, as well as the vessel, are things maritime.

We return finally to *Smith* v. *Maryland*, 18 How 71. It must be plain from the report that the court did not realize that it had before it there a cause of seizure for maritime forfeiture, or had it been so, would it have departed from the long line of authority commencing with La Vengeance, with only the statement that the state law does not conflict "with the admiralty jurisdiction of any court of the United States"? It is clear from the case that the only points under consideration were whether the Maryland Oyster Law was a proper state regulation, and whether the power of regulation in territorial waters was or was not concurrent in the state and the United States. The case decided that the regulation of oyster taking was exclusively in the states, and that such regulation was not prohibited as an infringement of the commerce or admiralty grants. It still stands as authority on those points. But we submit the case is no authority on any point which was neither appreciated or decided.

Respectfully submitted,

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